No. 03-1627

Supreme Court, U.S.
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In The
Supreme Court of the United States

MICHAEL T. HOWELL AND CHERI A. HOWELL,

Petitioners,

v.

HUGH RICCI, P.E., STATE ENGINEER, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, AND PACIFIC RECLAMATION WATER COMPANY, A NEVADA CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Nevada

BRIEF IN OPPOSITION OF RESPONDENT PACIFIC RECLAMATION WATER COMPANY, A NEVADA CORPORATION

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QUESTIONS PRESENTED

Respondent Pacific Reclamation Water Company (Pacific Reclamation) disagrees with the Questions Presented by Petitioners Michael T. Howell and Cheri A. Howell (Howells) and believes the questions before this Court are actually as follows:

1. Whether the Nevada Supreme Court's reference to "due process" in its Order of Affirmance is mere *obiter dictum*, when its decision was based on the resolution of State law claims that independently preclude the Howells' requested relief, regardless of the merits of the due process claim.

2. Whether the Howells have standing to assert their procedural due process claim, when the claim is based on the alleged deprivation of procedural due process in 1945 by distant predecessors in title to the Howells' real property who are not parties to this action, and who themselves would have been prevented from bringing the Howells' procedural due process claim had they chosen to do so at the time this litigation was commenced due to statutes of limitation and repose.

3. Whether the Howells' due process claims are time-barred.

LIST OF PARTIES

The Petitioners correctly identify the parties.

CORPORATE DISCLOSURE

Pursuant to Supreme Court Rule 29.6, Pacific Reclamation Water Company states that Pacific Reclamation Water Company is a privately held Nevada Corporation. None of its shares is held by a publicly traded company.

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STATEMENT OF THE CASE AND SUMMARY OF PROCEEDINGS

I. INTRODUCTION.

This lawsuit involves a challenge to an administrative transfer of water rights by the Nevada State Engineer that took place in northeastern Nevada almost 60 years ago. The water rights at issue consist of 116.43 acres that were adjudicated under Proof Number 00608 of the Humboldt Decree. Petitioners, Michael T. and Cheri A. Howell (Howells), who, on August 20, 1997, purchased the real property to which the water rights were previously appurtenant now seek to reverse a 1945 decision of the Nevada State Engineer which changed the place of use of this water, resulting in the water being moved from land that was then owned by Alonzo and Clair Knudsen (Knudsens), who are distant predecessors in title to the Howells' real property, onto land owned by shareholders of Respondent Pacific Reclamation Water Company (Pacific Reclamation).

Pacific Reclamation is a water company that was incorporated on April 8, 1911 to administer water for the benefit of its shareholders in the vicinity of Metropolis, Nevada. The Nevada State Engineer's 1945 decision to approve the applications changing the place of use of the water, referred to as Applications 11125 and 11127,[1] resolved applications which had been pending before the Nevada State Engineer since 1910 and, since 1945, Pacific Reclamation has relied on the Nevada State Engineer's decision, rightfully believing that the disputed water rights could be used to serve its shareholders.

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[1] The water rights at issue were contained in Applications 11125 and 11127. These Applications were subsequently approved and resulted in Certificates of Appropriation, which were recorded with the Elko County Recorder on February 16, 1945. (Pet. App. 69-80). However, for convenience, the term "Applications" will be used when collectively referring to the water rights transferred to Pacific Reclamation in 1945.

II. BACKGROUND.

On June 14, 1944, Pacific Reclamation filed two Applications for Permission to Change Point of Diversion, Manner of Use and Place of Use of the Public Waters of the State of Nevada Heretofore Appropriated, bearing the serial numbers 11125 and 11127 (hereinafter collectively referred to as the "Applications") with the Nevada State Engineer. (Pet. App. 45-64). Subsequently, the Nevada State Engineer published the Applications in the Wells Progress, a weekly newspaper published in Wells, Nevada, for five weeks, with the first publication on July 7, 1944 and the last publication on August 4, 1944. (Pet. App. 65-68). As noted in the Order of Affirmance, this was done in accordance with the public notice and filing requirements in effect at the time. (Pet. App. 8). On February 14, 1945, Application 11125 was granted by the Nevada State Engineer, as described in Certificate of Appropriation Number 2846 (Pet. App. 69-74) and on February 4, 1945, Application 11127 was granted by the Nevada State Engineer, as described in Certificate of Appropriation Number 2848. (Pet. App. 75-80).

At all relevant times, NRS 533.450 and its earlier versions have set forth fixed periods of time during which actions for judicial review of orders or decisions of the Nevada State Engineer had to be commenced in a proper court. In 1945, the statute that is now codified at NRS 533.450(1) and (3) read, in pertinent part, as follows:

> Any person feeling himself aggrieved by any order or decision of the Nevada State Engineer, acting in person or through his assistants or the water commissioners, affecting his interests, when such order or decision relates to the administration of determined rights or is made pursuant to sections 52 to 88, inclusive, of this act, may have the same reviewed by a proceeding for that purpose, in so far as may be in the nature of an appeal, which shall be initiated in the proper court of the county in which the matters affected or a portion thereof are situated. The proceedings in every case shall be heard and tried by the court, and shall be informal and

> summary, but full opportunity to be heard shall be had before judgment is pronounced. ***And no such proceeding shall be entertained unless notice thereof, containing a statement of the substance of the order or decision complained of, and of the manner in which the same injuriously affects the petitioner's interests, shall have been served upon the Nevada State Engineer, personally or by registered mail, at this office at the state capitol within thirty days following the rendition of the order or decision in question.*** A similar notice shall also be served personally or by registered mail upon the person or persons who may have been affected by such order or decision. . . . The decision of the Nevada State Engineer shall be *prima facie* correct, and the burden of proof shall be upon the party attacking the same.

Stats. 1913, c. 140, sec. 75, as amended Stats. 1915, c. 253, sec. 13. (Emphasis supplied) Thus, actions for judicial review of decisions or orders of the Nevada State Engineer became time-barred if the Nevada State Engineer was not given notice within 30 days of the rendition of the order or decision in question.

The record gives no indication as to whether the Knudsens had actual notice of the Applications during the 30 day period after the Applications were approved, nor is there any indication in the record that anyone protested the Applications after they were submitted and published or that anyone commenced judicial proceedings in a proper court to challenge the Nevada State Engineer's decision to approve them. However, the record does show that 17 years later, on June 18, 1962, Alonzo Knudsen, through his attorney Ross P. Eardley, questioned the Applications with the Nevada State Engineer. (Pet. App. 81-82). The Nevada State Engineer responded on June 22, 1962 by reaffirming the validity of the 1945 decision. (Pet. App. 83). The record also reflects that Royce Wood, a successor in title to the Knudsen's real property, made similar

inquiries in 1986, to which the Nevada State Engineer again responded by upholding the validity of the 1945 decision. (App. 1-4). There is no record that Mr. Wood took any further action.

In 1995, the Nevada Legislature added several new statutes to the Water Code, including NRS 533.386, as part of an effort to formalize the process for the approval of water right applications and permits by the Nevada State Engineer. NRS 533.386 requires the Nevada State Engineer to approve reports of conveyance once certain conditions are met, to include the condition that "no conflict exists in the chain of title that can be determined by the state engineer from conveyance documents or from other information on file in the office of the state engineer." NRS 533.386(1)(b). Conversely, NRS 533.386 also requires the Nevada State Engineer to reject a report of conveyance that is found to be deficient. NRS 533.386(2). As discussed in the Order of Affirmance, this statute only applies prospectively and does not affect water right applications that were approved prior to its enactment. (Pet. App. 1-12).

On or about August 19, 1997, the Hawks, who were Royce Wood's successors and the Howells' predecessors in title, filed a report of conveyance[2] with Nevada State Engineer pursuant to NRS 533.386 seeking to transfer the place of use of the water described in Applications 11125 and 11127 onto their own land; the Hawks amended their

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[2] The Howells refer to this document as the "Hawks'/Howells' report of conveyance." Petition for Writ of Certiorari, p. 5. That is a misstatement, however, since even though the report of conveyance was submitted the day before the Howells acquired the real property and even though there appears to have been some agreement between the Hawks and Howells concerning the water rights, only the Hawks actually submitted a report of conveyance and it was the Hawks and their counsel, John Marvel, not the Howells, who subsequently corresponded with the Nevada State Engineer in an effort to have the report of conveyance confirmed. (App. 5-16). The details of the arrangement between the Hawks and the Howells were not presented in the proceedings below.

report of conveyance on March 19, 1998.[3] (App. 8-9). On February 11, 1999, Ms. Lisa B. Schettler, an Engineering Technician with the Nevada State Engineer, issued a letter denying the Hawks' request to transfer the waters described in the Applications onto their property and, again, reaffirming the validity of the 1945 decision to approve the Applications. (App. 12-14). There is no record that this reaffirmation was disputed by the Hawks until May 25, 1999, when Mr. Marvel, the Hawks' attorney, sent a letter to the Nevada State Engineer challenging the February 11, 1999 letter. (App. 15-16). Nevertheless, no petition for judicial review was filed with respect to the Nevada State Engineer's February 11, 1999 letter.

On June 15, 1999, Barbara Kightlinger, a Management Assistant with Nevada State Engineer, sent a letter to the Hawks in error that, on its face, appeared to contradict the February 11, 1999 letter by stating that the water

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[3] In their Petition for Writ of Certiorari, the Howells place great weight on the documents supporting their claim that they have a superior chain of title to the water rights than does Pacific Reclamation. However, as is discussed elsewhere in this Brief in Opposition, in Nevada, title to real property does not necessarily correlate to title water rights, since water rights can be moved from one piece of property to another through an administrative act of the Nevada State Engineer without any documents ever being recorded outside of the agency's own records. Nevertheless, in an effort to advance this misleading argument, the Howells mischaracterize the Nevada State Engineer's June 22, 1962 letter to Alonzo Knudsen's attorney, Ross P. Eardley, indicating that the letter contains a statement by the Nevada State Engineer that "Pacific Reclamation had acquired [the water rights] by virtue of a Quitclaim Deed dated June 5, 1944." (Petition for Writ of Certiorari, p. 3). However, that is not what the Nevada State Engineer's letter stated. Rather, in that letter, the Nevada State Engineer merely indicated that the June 5, 1944 Quitclaim Deed from Cooperative Security Corporation to Pacific Reclamation "confirmed" Pacific Reclamation's ownership of these rights. Pacific Reclamation acquired ownership of the water rights by virtue of the Nevada State Engineer's administrative act of transferring the water rights onto property owned by Pacific Reclamation's shareholders by approving the Applications in 1945, not upon the conveyance of any real property by deed.

rights had been assigned to show the Hawks as the owners. However, this letter, which appears to have been essentially a standard form letter routinely sent to applicants, further stated that the assignment was "subject to amendment upon receipt of additional information." (Pet. App. 84-85). On July 19, 1999, Mrs. Kightlinger sent another letter to the Hawks rescinding the June 15, 1999 letter and upholding the validity of the Applications. (Pet. App. 30-31).

III. JUDICIAL PROCEEDINGS.

On August 18, 1999, the Howells commenced this litigation by filing a "Petition for Judicial Review from Order or Decision of Nevada State Engineer (NRS 533.450)" challenging the "decision" of the Nevada State Engineer contained in the July 19, 1999 letter.[4] On or about November 20, 1999, the Howells filed a "Second Amended Petition for Judicial Review." (Pet. App. 86-96). Pacific Reclamation timely filed a responsive pleading. During the District Court proceedings, the court ordered the parties to submit briefs stating their positions and a trial was conducted on April 22, 2002. The Howells did not argue that the Knudsens had been deprived of procedural due process, but instead relied on the 1995 amendments to the Water Code, particularly NRS 533.386, in arguing that their superior chain of title to the real property provided legal and equitable grounds for moving the water rights back to where they were prior to the approval of the 1945 Applications. In response, Pacific Reclamation argued that NRS 533.386 only applied prospectively and that the Howells were procedurally barred from bringing their claim for a number of reasons. The Nevada State Engineer argued that it found a conflict in the chain of title to exist

[4] In its Order of Affirmance, the Nevada Supreme Court held that "[t]he implied ruling contained within the State Engineer's July 19, 1999 letter did not constitute a final determination as to the ownership of the subject water rights that would be subject to review under the Nevada Administrative Procedures Act." (Pet. App. 8).

because Pacific Reclamation was shown to be the owner of the water rights in its records, while the chain of title to the real property appeared to indicate that the water rights were still on the property that the Howells purchased. Thus, NRS 533.386 prevented the Nevada State Engineer from confirming the Hawks' report of conveyance. Both Pacific Reclamation and the Nevada State Engineer also argued that the failure of the Knudsens to file a petition for judicial review within 30 days after the Applications were approved in 1945, a requirement under the version of NRS 533.450 that was in effect at the time, was a procedural bar to their claim.

On May 23, 2002, the District Court entered its Findings of Facts, Conclusions of Law and Judgment in which it denied the Howells' requested relief, holding as follows:

1. That the Howells are procedurally barred pursuant to NRS 533.450(1) and (3) from petitioning the Court for judicial review of the Nevada State Engineer's February 14, 1945 decision to grant Applications 11125 and 11127; and

2. That a conflict exists in the chains of title of the Howells and Pacific Reclamation, respectively, which prohibits the Nevada State Engineer from confirming the Howells' report of conveyance pursuant to NRS 533.386; therefore, the Court sustained the decision of the Nevada State Engineer to reject the Howells' report of conveyance.

Each of these holdings provided an independent basis for denying the Howells' their requested relief and the District Court did not consider the Howells' request for equitable relief.

(Pet. App. 13-29).

The Howells appealed the District Court's decision and, on April 1, 2003, the Nevada Supreme Court entered its Order of Affirmance, agreeing with the District Court in a decision signed by all seven Justices. (Pet. App. 1-12). In its decision, the Nevada Supreme Court held as follows:

> We affirm the district court judgment dismissing the Howells' petition for judicial review and affirming the State Engineer's decision to deny the

> report of conveyance. We conclude that: substantial evidence supported the State Engineer's decision; the district court correctly concluded that the Howells' petition was procedurally barred; and equitable relief is not warranted in this case.

(Pet. App. 10).

The Nevada Supreme Court also included the following footnote at the conclusion of its opinion:

> In light of our disposition of the other issues litigated in this appeal, we reject the Howells' claim that the original 1944 permits are void for lack of procedural due process.

(Pet. App. 11).

REASONS FOR DENYING REVIEW

I. INTRODUCTION.

Despite the Howells' attempt to re-characterize this case as involving significant procedural due process issues, it does not. This case is fundamentally about the application of two Nevada statutes contained in the Nevada Water Code, the first being a 1995 statute that prevents the Nevada State Engineer from confirming reports of conveyance where there is found to be a conflict in the chain of title and the second being a statute of repose that prevents aggrieved persons from seeking judicial review of decisions and orders of the Nevada State Engineer after 30 days. Other than the Nevada Supreme Court's decision not to grant the Howells' request for equitable relief, these two statutes form the basis for the Nevada Supreme Court's decision and, although there is a brief reference to "due process" in a footnote to the Order of Affirmance, that reference is *obiter dictum* and does not raise any constitutional issues warranting review. Moreover, the procedural due process claims described in the Petition for Writ of Certiorari are barred under the statute of limitations and the Howells lack both Article III and prudential standing to raise these claims.

II. THE NEVADA STATE ENGINEER WAS PREVENTED BY STATUTE FROM CONFIRMING THE HAWKS' REPORT OF CONVEYANCE BECAUSE OF A CONFLICT IN THE CHAIN OF TITLE.

At issue in this case is the correctness of the Nevada State Engineer's decision not to confirm the Hawks' 1998 report of conveyance and the ability of the Howells, as a matter of procedure, to obtain judicial review of that decision. Ownership of water rights in Nevada is unlike ownership of land in the sense that it is subject to administrative control by the Nevada State Engineer. Rather than being ownership of the water itself, ownership of a Nevada water right is actually ownership of no more than the ***right to use*** the public waters of the State of Nevada in accordance with a permit that is issued by the Nevada State Engineer. *See generally* NRS Chapter 533; *Application of Filippini*, 66 Nev. 17, 21-2, 202 P.2d 535 (1949). While title to real property certainly can include appurtenant water rights and while an unbroken, recorded chain of title to real property is superior to one that is incomplete or unrecorded, title to a water right does not necessarily pass from one person to another in the same manner as title to real property. Rather, under Nevada law, a water right can be divested from the real property to which it is appurtenant and may then be placed on completely different real property by a purely administrative act of the Nevada State Engineer. NRS 533.345, *et seq.* While that administrative decision would be recorded in the Office of the Nevada State Engineer (NRS 532.150(1)),[5] unlike title to land, there is no requirement that such a decision must also be recorded with the county recorder in order to be effective although, in this case, the record shows that the Certificates of Appropriate corresponding to the

[5] NRS 532.150(1) provides: "The records of the office of the State Engineer are public records and shall remain on file in his office and be open to the inspection of the public at all times during business hours." This statute was enacted in 1913.

Applications were, in fact, filed with the Elko County Recorder on February 16, 1945. (Pet. App. 70 and 76).

As the District Court observed during the proceedings below, Nevada water law has become stricter over time. (App. 17-18) However, at no point in time has the Nevada State Engineer been under a statutory obligation to make determinations as to the quality of the title to real property to which water rights are appurtenant prior to confirming applications and permits changing the place of use of water, although it historically appears to have been an informal policy of the Nevada State Engineer to do so, at least to a certain extent. Nevertheless, because disputes over ownership of water rights are frequently intertwined with disputes over title to real property, the Nevada State Engineer was often placed in the position of resolving competing claims to water rights based on conflicting chains of title to real property, which was beyond the Nevada State Engineer's area of expertise.

In 1995 the Nevada Legislature enacted NRS 533.382 through .387. These statutes effectively removed any unintended role the Nevada State Engineer might have had in quieting title to real estate and appurtenant water rights by establishing a somewhat rigorous requirement on the part of water right applicants to provide documentation showing that their title to the water rights was not in conflict with (as opposed to superior to) someone else's. NRS 533.386. Due to the passage of that statute, title must now be demonstrated by deeds or any other documentation showing that the applicant has title to the water by virtue of the water being appurtenant to real property which, in turn, is supported by a clear chain of title. NRS 533.382 through .384. However, no language in these statutes gives them any retroactive effect and there is no indication that disputes over ownership of water rights resolved by the Nevada State Engineer prior to 1995 were in any way affected by their enactment.

The Howells' Petition for Writ of Certiorari fails to recognize that regardless of whether the Knudsens were deprived of procedural due process in the mid-1940's,

either by lack of adequate notice or due to the impairment of existing rights, the Nevada State Engineer was statutorily prevented from confirming the Hawks' report of conveyance, which was submitted in 1997, since NRS 533.386(1)(b) states, in pertinent part, that the Nevada State Engineer shall only approve a report of conveyance if he or she determines that "[n]o conflict exists in the chain of title that can be determined by the state engineer from the conveyance documents or from other information on file in the office of the state engineer." NRS 533.386(3) further provides, in pertinent part, that if "the state engineer determines that the report of conveyance is deficient, he shall reject the report of conveyance and return it to the person who submitted it." As the District Court pointed out, the "intent of this provision was to take the State Engineer out of the position of resolving title disputes." (Pet. App. 23).

The District Court also observed that if there is substantial evidence to support the Nevada State Engineer's determination that a report of conveyance should be rejected because a conflict exists in the chain of title, then the determination must be upheld. (Pet. App. 23). The Nevada Supreme Court agreed that the substantial evidence standard was the correct standard to apply, and both the District Court and the Nevada Supreme Court found that the Nevada State Engineer was presented with a conflict in the chain of title when the Hawks presented their report of conveyance, since the records of the Nevada State Engineer's Office indicated that the water rights had been taken off the Knudsens' lands through Applications 11125 and 11127 in 1945 and now belonged to Pacific Reclamation. Thus, the Nevada State Engineer was obligated under NRS 533.386 to reject the Hawks' report of conveyance, regardless of whether the Knudsens were given adequate notice and regardless of the statutory authority of the Nevada State Engineer to approve the Applications decades earlier. NRS 533.386 was intended to keep the Nevada State Engineer out of resolving such disputes by rejecting reports of conveyance where there

are found to be conflicts in title and that is exactly what occurred in this case.

III. THE HOWELLS' DUE PROCESS CLAIMS ARE PROCEDURALLY BARRED UNDER NRS 533.450.

In addition to the requirements of NRS 533.386, both the District Court and the Nevada Supreme Court recognized that the Howells' various challenges to the Nevada State Engineer's 1945 decision to grant Applications 11125 and 11127 are procedurally barred pursuant to NRS 533.450. (Pet. App. 10 and 28-29). NRS 533.450 establishes the procedure by which a person aggrieved by a decision or order of the Nevada State Engineer granting or denying a record of conveyance may obtain judicial review. Repose is one of the functions of this statute, since it requires an aggrieved person to seek judicial review of a final order or decision of the Nevada State Engineer within 30 days. There does not appear to be any basis for tolling this statute of repose and the Howells do not argue otherwise. Moreover, even if there were grounds for somehow tolling the 30 day statute of repose following the Nevada State Engineer's 1945 decision, certainly any such tolling period would have expired in 1962 when the Knudsen's attorney questioned the 1945 decision, since any challenge to the decision could have been made then.

In an effort to circumvent this issue, the Howells argued before the lower courts that their Petition for Judicial Review was timely filed on August 18, 1999 and was not barred by the 30 day limit contained in NRS 533.450 because their appeal involved the Nevada State Engineers's July 19, 1999 decision not to confirm their report of conveyance within 30 days pursuant to NRS 533.382, rather than the Nevada State Engineer's 1945 decision to approve Applications 11125 and 11127. The Howells argued that their report of conveyance complied with NRS 533.382 in all pertinent respects, that the Nevada State Engineer initially confirmed the report of conveyance on that basis and that it was the Nevada State Engineer's "rescission" of that assignment of water rights

that was being challenged. Therefore, argued the Howells, their Petition for Judicial Review was timely filed.

However, the facts do not support this argument. As stated, in 1999, the Nevada State Engineer wrote three separate letters to the Howells' immediate predecessors-in-interest (the Hawks):

1. The first of these three letters, dated February 11, 1999, was a written decision denying the Hawks' request to transfer the disputed water onto their property; this letter reaffirmed the validity of Applications 11125 and 11127. (App. 12-14).

2. The second letter, dated June 15, 1999, stated that the waters had been assigned to show the Hawks as the owners "subject to amendment upon receipt of additional information." (Pet. App. 84-85).

3. The third letter, dated July 19, 1999, which is the letter that the Howells argue gave them the right to judicial review, in fact merely rescinded the June 15, 1999 letter and continued to reaffirm the 1945 decision, as the Nevada State Engineer had done a number of times previously. (Pet. App. 30-31).

The threshold issue to be considered in this regard is whether the July 19, 1999 letter resulted in an appealable decision or order within the meaning of NRS 533.450. In order for any claim brought by the Howells not to have been time-barred, the June 15, 1999 letter would have to constitute a final decision or order, since the Howells argued that the July 19, 1999 letter represented a change in the agency's position from the June 15, 1999 letter. It logically follows, therefore, that the Howells were arguing, at least by implication, that ***both*** the June 15, 1999 and July 19, 1999 letters represented separate final agency actions.

Although NRS Chapter 533 does not define precisely what constitutes an appealable "decision" or "order," it is generally recognized that an agency's decision or order is not appealable until it is final. As was stated by the Pennsylvania Supreme Court in *Pennsylvania Labor Relations Board v. Puritan Cleaners*, 103 A.2d 904, 905

(Penn. 1954) in deciding that an administrative order was not final and, thus, not subject to appeal:-

> An order is not final until it definitively and conclusively disposes of a pending action. The braid of litigation must end in a firm knot which ties every strand of the controversy so that nothing is left to conjecture, surmise or additional inquisition.

Id. Moreover, in order to be appealable, an "order" must generally "adjudicate a right or impose a duty on a party." *See Forney v. Apfel*, 524 U.S. 266, 267 (1998); *Barr v. State Compensation Department*, 463 P.2d 871, 873 (Ore. 1970). Similarly, agency "decisions" are not considered appealable unless they involve some judicial act. Purely ministerial decisions, administrative acts and agency recommendations, which do not deprive anyone of rights, are not considered to be final decisions subject to judicial review. Moreover, if something further remains to be done before the agency decision becomes final, it is not an appealable decision. *McGraw v. Marion County Plan Commission*, 174 N.E.2d 757, 760-1 (Ind. 1961).

Following these principles, the June 15, 1999 letter, while perhaps giving the Hawks the initial impression that their report of conveyance had been approved, did not actually constitute a final decision. Rather, this letter was in keeping with NRS 533.375 which states, in pertinent part, that "[b]efore either approving or rejecting [an] application, the Nevada State Engineer may require such additional information as will enable him to guard the public interest properly." Therefore, while the Nevada State Engineer had apparently performed some sort of administrative or ministerial act by changing certain documents to show the Hawks as the owners of the disputed water rights and sending out a standard letter to that effect, the Nevada State Engineer had not yet formally approved or rejected the Hawk's application. It should also be recognized that this letter ***could not*** have changed the place of use of the disputed waters onto the Hawks' property, which would have effectively divested Pacific Reclamation of its recognized water rights, since no notice had been published in accordance with NRS

533.360 and since Pacific Reclamation had not been given an opportunity to be heard. In short, the July 19, 1999 letter in which the Nevada State Engineer rescinded the June 15, 1999 letter could not have constituted a decision to reverse a prior decision granting the Hawks' application, since there was no such prior decision to reverse.

The next issue, therefore, is whether the July 19, 1999 letter, through the act of reaffirming the Nevada State Engineer's 1945 decision, opened the door to a new challenge to the 1945 decision, despite the time limits on commencing actions for judicial review contained in NRS 533.450 and its earlier versions. In the Order of Affirmance, the Nevada Supreme Court found that it did not, stating, "The implied ruling contained in the State Engineer's July 19, 1999 letter did not constitute a final determination as to the ownership of the subject water rights that would be subject to review under the Nevada Administrative Procedures Act." (Pet. App. 8). This finding is consistent with cases from a number of jurisdictions holding that a statute of repose bars actions that are commenced past the expiration of the time limit contained in the statute, even if the action is based on irregularities in the proceedings. Significantly, a later decision to reaffirm the time-barred decision does not reset the clock for commencing an action. Once the time for filing suit expires, aggrieved parties are forever barred from bringing an action based on challenges to the original decision. *Wright v. Town of Kennebunkport*, 715 A.2d 162 (Maine 1988) (alleged illegality of permit at time of issuance does not toll appeal period in statute of repose; affected parties could have discovered illegality through reasonable diligence and individuals relying on permit must be able to rely on permit with confidence); *United Parcel Service v. People's Counsel for Baltimore County, Md.*, 650 A.2d 226 (1994) (letter from zoning commissioner explaining and defending previous decision to approve application for building permit did not constitute appealable event); *Kolodny v. Board of Appeals of Brookline,* 191 N.E.2d 689 (1963) (building commissioner's decision letter

denying request to revoke building permits not a "decision" from which appeal may be taken, but rather, is a reaffirmation of the prior decision to issue the permits).

The Nevada Supreme Court has recognized that statutes such as NRS 533.450 and its 1945 equivalent are statutes of repose. As stated in *G and H Associates v. Hahn*, 113 Nev. 265, 271, 934 P.2d 229 (1997) and *Alsenz v. Twin Lakes Village, Inc.*, 108 Nev. 1117, 1120, 843 P.2d 834 (1992) both quoting *Allstate Ins. Co. v. Furgerson,* 104 Nev. 772, 775 n.2, 766 P.2d 904, 906 n.2 (1988):

> "Statutes of repose" bar causes of action after a certain period of time, regardless of whether damage or an injury has been discovered. In contrast, "statutes of limitation" foreclose suits after a fixed period of time following occurrence or discovery of an injury.[6]

Ibid. Accordingly, NRS 533.450 and its earlier versions operate as a procedural bar to any future causes of action filed after the time period specified in the statute. *See, e.g., Armburst v. United Tel. Co. of Ohio, Inc.,* 695 N.E.2d 823 (Ohio 1997) (statute of repose is absolute bar to cause of action filed after specified time period, regardless of when action accrued); *Hill v. Fordham*, 367 S.E.2d 128 (Ga. App. 1988) (statute of repose cannot be tolled to permit actions to be brought for injuries which did not occur until after statutory period had expired); *Peterson, ex rel. Peterson v. Burns*, 635 N.W.2d 556 (S.D. 2001) (a statute of repose

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[6] A statute of repose, which can never extend but can shorten the applicable statute of limitation, may cut off the right of action before the injured party discovers or reasonably should have discovered the injury. "[A] cause of action can simultaneously accrue for purposes of the statute of repose and statute of limitations; however, the cause of action will usually accrue for statute of limitation purposes after it has accrued for statute of repose purposes." *G and H Assocs.*, 113 Nev. at 272. Significantly, however, while a statute of limitations extinguishes the availability of a remedy, a statute of repose actually extinguishes the underlying right itself. *Flannigan v. W.C.A.B. (Colt Industries)*, 726 A.2d 424 (Pa. Cmwlth. 1999); *Wyatt v. A-Best Products Co.*, 924 S.W.2d 98 (Tenn. Ct. App. 1995).

bars all actions after a specific period of time has run from the occurrence of some event other than the occurrence of an injury that gives rise to a cause of action); *Friends of Clark Mountain Foundation, Inc. v. Board of Sup'rs of Orange County*, 406 S.E.2d 19 (Va. 1991) (statute of repose involves legislatively mandated limitation which reflects policy determination that point in time arrives beyond which defendant should be immune from liability for past conduct).

As with a statute of limitation, one of the principal purposes of a statute of repose is to protect persons from having to endure unending liability. *See Alsenz*, 108 Nev. at 1120. As this Court stated in *United States v. Kubrick*, 444 U.S. 111, 117 (1979), repose statutes afford "plaintiffs what the legislature deems a reasonable time to present their claims" while protecting "defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise." *Id.* (Citations omitted).[7] "[T]he failure to seek review of an

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[7] With respect to the Howells' argument that notice by publication, which was the only notice required under the relevant portion of the Water Code at the time the Applications were approved in 1945, was unconstitutional without there also being a reasonable effort to provide actual notice, the Howells only ***speculate*** that the Knudsens were not provided actual notice of Applications 11125 and 11127 before they were approved in 1945. The record simply does not indicate whether the Knudsens had actual notice during that time frame and they might just as easily as not have had actual notice before the Applications were approved. The record also does not indicate whether the Knudsens exercised reasonable diligence to inquire as to the status of the water rights during that time frame and there is nothing to show that the existence of the Applications could not have been readily discerned by examining the Nevada State Engineer's records. Rather, the facts in the present case demonstrate that, in 1944, the Nevada State Engineer complied with all then-applicable notice requirements in approving Applications 11125 and 11127 and, for all we know today, the Knudsens may very well have seen the notices in the Wells Progress at the time they were published, recognized their water rights and simply decided not to act. This, of course, involves speculation, but no more speculation

(Continued on following page)

administrative agency decision within the time and in the manner provided by [the statute] results in the decision becoming final and not subject to judicial review for mere legal error or factual insufficiency." *Guminski v. Arizona State Veterinary Medical Examining Board*, 33 P.3d 514, 516 (Ariz. App. 2001) (quoting *State ex rel. Dandoy v. City of Phoenix*, 651 P.2d 862, 865 (Ariz. App. 1982)). Once the agency makes a decision and the statutory time period for protesting and seeking judicial review have passed, the matter cannot later be revived by seeking a redetermination of the decision. As stated in *Guminski*, "The term 'decision' does not apply to the [agency's] ruling on requests for rehearing or review and we find no intent in the statutes or rules to allow potentially limitless extensions of the time to seek judicial review resulting from repeated denials of rehearing, review or reconsideration." *Guminski*, 33 P.3d at 517.

It should also be noted that a statute of repose creates a substantive right that cannot later be modified so as to divest a person of that right. *Wiley v. Roof*, 641 So. 2d 66, 68 (Fla. 1994) (once an action is barred, a property right to be free from a claim has accrued); *Duran v. Henderson*, 71 S.W.3d 833 (Tex. App. 2002) (a statute of repose creates a substantive right in those protected to be free from liability after a legislatively-determined period). A statute of repose also serves the purpose of allowing a potential defendant to readily determine his rights on a fixed date, thus serving the need for finality. *Sterlin v. Biomune Systems*, 154 F.3d 1191, on remand 114 F. Supp. 2d 1163 (10th Cir. 1998). Indeed, allowing a person to revive an action otherwise time-barred by a statute of repose by merely reasserting the action with cosmetic differences

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than that which is engaged in by the Howells. It would certainly appear that this case presents a classic example of why repose statutes are necessary, demonstrated by the Howells' efforts to use innuendo in order to create a hypothetical scenario about events of over a half-century ago, a scenario which can neither be supported nor rebutted through evidence due to the deaths or disappearances of witnesses and, quite possibly, through the loss of documents as well.

would effectively eviscerate the purpose behind the statute. *See, e.g., Carolina Indus. Prods., Inc. v. Learjet, Inc.*, 189 F. Supp. 2d 1147, 1170-71 (D. Kan. 2001); *Butchkosky v. Enstrom Helicopter Corp.*, 855 F. Supp. 1251, 1257 (S.D. Fla. 1993) (a Federal statute of repose pertaining to aircraft accident cases is not revived by the re-issuance or alteration of maintenance manuals during the period of repose). In sum, because any challenges that might have been made to the 1945 decision to approve the Applications were not made within the 30 day time limit set forth in the 1945 version of NRS 533 450, those challenges are no longer actionable.

IV. THE REFERENCE TO DUE PROCESS IN THE ORDER OF AFFIRMANCE IS *OBITER DICTUM*.

In the Order of Affirmance, the lower court clearly and specifically outlined the bases for its decision in the Conclusion to the opinion, as follows:

> We affirm the district court judgment dismissing the Howells' petition for judicial review and affirming the Nevada State Engineer's decision to deny the report of conveyance. We conclude that: substantial evidence supported the Nevada State Engineer's decision; the district court correctly concluded that the Howells' petition was procedurally barred; and equitable relief is not warranted in this case.

(Pet. App. 10). None of these listed bases for the decision involved the resolution of constitutional or other federal issues in any respect, but were entirely based on State law. Nevertheless, despite this unequivocal language, the Howells now argue that the Nevada Supreme Court "has decided an important federal question in a way that conflicts with long standing decisions of the Supreme Court of the United States."The Howells base this statement exclusively on the following footnote in the lower court's opinion:

> *In light of our disposition of the other issues litigaed in this appeal*, we reject the Howells' claim that the original 1944 permits are void for lack of procedural due process.

(Pet. App. 11). However, that reference to "due process" was nothing more than *obiter dictum*. The Nevada Supreme Court did not resolve any due process issues in its decision and nothing contained in the Order of Affirmance could have any precedential impact on that subject.[8]

As this Court is aware, a dictum is a statement which is not "necessary" to a court's decision. *Church of the Lukumi Babalu Aye, Inc. v. Church of Hialeah*, 508 U.S. 520, 572-3 (1993) (Souter, J., concurring in part and concurring in the judgment).

> "A dictum has . . . been defined as an opinion expressed on a point in which the judicial mind is not directed to the precise question necessary to be determined to fix the rights of the parties, or an opinion of a judge which does not embody the resolution or determination of the court, and made without argument, or full consideration of the point, not the professed deliberate determination of the judge himself.

21 C.J.S. *Courts* § 142. Certainly, while a given case might have any number potential rationales for the result, in order for the law to consist of more than an arbitrary collection of facts and outcomes, courts must be able to distinguish between what they deem relevant and what they deem irrelevant. In the present case, the only logical interpretation of the lower court's use of the prefatory language "[i]n light of our disposition of the other issues litigated in this appeal" is that the court did not intend to rule on the Howells' due process claim because it was unnecessary to do so in light of the resolution of the

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[8] The Howells state that "[t]he Court apparently connects the due process issues in some way to the 'other issues' addressed in its Order, but the footnote offers no further explanation." Petition for Writ of Certiorari, p. 11. However, it is only logical to conclude that the "connection" between due process and the "other issues" is that the resolution of the "other issues" rendered it unnecessary to consider the Howells' due process arguments on their merits.

Howells' State claims. Indeed, the statement in Footnote 24 does not even identify which of the Howells' two due process arguments it supposedly resolved (e.g., "inadequate notice to property owner" versus "misuse of Nevada's water statutes"), much less express an opinion one way or another as to whether the Howells might have prevailed on either or both of these arguments had they been considered. Moreover, even if the lower court had considered one or both of the Howells' due process arguments, the result would have been of no import, since the Nevada State Engineer was unable to confirm the Hawks' report of conveyance by statute and since the Howells were procedurally barred from bringing the claim in the first place.

Because the statement only appears as an aside and is extraneous to the lower court's ruling, the reference to "due process" in Footnote 24 is mere dictum, having no precedential effect, and can only be interpreted to mean that the lower court did not believe it was necessary to consider the Howells' due process arguments in light of the resolution of the State law claims. Accordingly, any decision this Court might make as to the propriety of the lower court's decision not to consider the Howells' due process arguments would involve the interpretation of an "abstract, hypothetical or contingent" question, in violation of Article III's case-or-controversy requirement. *Alabama State Fed'n of Labor v. McAdory*, 325 U.S. 450, 461 (1945).

V. THE HOWELLS' DUE PROCESS CLAIMS ARE BARRED UNDER THE STATUTE OF LIMITATIONS.

As is discussed above, there is no dispute that Alonzo Knudsen knew about the Applications at least by 1962. However, even assuming arguëndo that 1962 is when Mr. Knudsen first learned about the Applications, NRS 11.220, which is a "catch-all" statute of limitation requiring that actions not otherwise provided for must be commenced within four years after the accrual of the cause of action, barred a constitutional challenge to the Nevada State

Engineer's decision to grant the Applications no later than 1966.

This Court recognized in *Kubrick*, supra, 444 U.S. at 123 that even where a plaintiff does not know he has a right of action, once the plaintiff is "armed with the facts about the harm done to him," he can protect himself by seeking legal advice. In this case, the record clearly shows that the Knudsens ***did*** seek legal advice, since it was their attorney, Ross P. Eardley, who wrote the 1962 letter to the Nevada State Engineer concerning the 1945 decision. As this Court stated in *Kubrick*, "[t]o excuse [a plaintiff] from promptly doing so by postponing the accrual of his claim would undermine the purpose of the limitations statute, which is to require the reasonably diligent presentation" of claims. *Id.* The record provides no basis for tolling the statute of limitations between 1966 and 1999, which is when the Howells commenced this lawsuit, and this statute of limitations operates as an independent bar to the Howells' action.

Interestingly, the Howells have not argued otherwise throughout the course of these proceedings but, as discussed, have instead attempted to fashion their case in such a manner as to make it appear to be a challenge to the Nevada State Engineer's refusal to confirm the Hawks' report of conveyance 1999 rather than the 1945 decision to grant the Applications, even though the 1999 reaffirmation involves exactly the same water rights. That argument, however, is nothing more than a loosely-veiled disguise in an effort to impermissibly attack a 58-year-old decision.[9] Certainly, to allow the Howells' substantive challenges to the Applications to proceed on that basis,

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[9] As this Court has held, "the commission of a separate new overt act generally does not permit the plaintiff to recover for the injury cause by old overt acts outside the limitations period." *Klehr v. A.O. Smith Corporation*, 521 U.S. 179, 187-9 (1997) (holding that applying "last predicate act rule" to civil RICO actions would create a limitations period that is longer than Congress could have contemplated, because a series of predicate acts can continue indefinitely, thus lengthening the limitations period dramatically).

particularly in light of the fact that the Howells' predecessors could have made the very same arguments decades ago, would nullify the statute of limitations and would have the potential to open the door to a multitude of potential suits that have long been thought to be time-barred.

The Howells also argue that the Nevada State Engineer's 1945 decision was void because it deprived the Knudsens of procedural due process. Therefore, argue the Howells, this Court is free to set aside the decision at any time, irrespective of repose statutes. Along these same lines, the Howells argue, at least in part, that *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950) should be applied retroactively so as to render the Applications void *ab initio*. Thus, it appears that according to the Howells, the temporal relationship between the events of this case should not be considered. That, however, is inconsistent with several of this Court's decisions.

With respect to the issue of whether *Mullane* should be applied retroactively to the 1945 Applications, this Court held as follows in *Harper v. Virginia Department of Taxation*, 509 U.S. 86, 97 (1993):

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.

Id. Nonetheless, "[n]ew legal principles, even when applied retroactively, do not apply to cases already closed." *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 758 (1995) (comparing *United States v. Estate of Donnelly*, 397 U.S. 286, 296 (1970) (Harlan, J., concurring) (at some point, "the transaction has acquired such a degree of finality that the rights of the parties should be considered frozen. . . . [I]n the civil area that moment should be when the transaction is beyond challenge . . . because the statute of limitations has run"). This rule was applied in *Cipriano v.*

City of Houma, 395 U.S. 701 (1969), a case involving the constitutionality of provisions of Louisiana law which gave only "property taxpayers" the right to vote in elections called to approve the issuance of revenue bonds by municipal utilities. In *Cipriano*, this Court invalidated the challenged statute, but was then faced with the issue of whether the ruling should be applied retroactively. In deciding that it should not, this Court stated, "we will apply [our decision] only where, under state law, the time for challenging the election result has not expired, or in cases brought within the time specified by state law for challenging the election and which are not yet final." *Id.* at 706. Here, the four year statute of limitations contained at NRS 11.220 barred any constitutional challenges to the Applications no later than 1966. The record provides no basis for tolling the statute of limitations between 1966 and 1999, which is when the Howells commenced this lawsuit. Thus, even if this Court were to apply the holding in *Mullane* retroactively to the process by which the Applications were published and approved in 1945, the Howells' claim would still be time-barred.

Finally, it should be noted that "[t]he right to assert the statute of limitations as a complete defense is considered to be property within the protection of a constitutional guaranty of due process of law." 51 Am. Jur. 2d, *Limitation of Actions* § 4. Thus, if any party has a right to assert a due process argument, it is Pacific Reclamation. Pacific Reclamation has a constitutionally-protected property interest in the water rights at issue in this case and has had the right to rely on NRS 11.220 as a statute of limitations and 533.450 (along with its earlier versions) as a statute of repose since 1945. In short, granting the Howells' requested relief based on constitutional deprivations that allegedly occurred in 1945 would deprive Pacific Reclamation of valuable property rights conferred upon it by NRS 11.220 and 533.450.

VI. THE HOWELLS LACK STANDING TO RAISE THEIR PROCEDURAL DUE PROCESS CLAIMS.

The Howells also lack both Article III and prudential standing to bring their due process claims, which challenge the level of notice that was given to the Knudsens prior to the approval of the Applications and the statutory authority of the Nevada State Engineer to approve the Applications in 1945. Article III standing requires that the litigant allege an "injury in fact . . . that is, a sufficiently concrete interest in the outcome of their suit to make it a case or controversy subject to a federal court's Art. III jurisdiction . . . " *Singleton v. Wulff*, 428 U.S. 106, 112 (1976). "[A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.'" *Valley Forge College v. Americans United*, 454 U.S. 464, 471 (1982) (quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979)). As stated in *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656, 663-4 (1993):

> It has been established in a long line of cases that a party seeking to invoke a federal court's jurisdiction must demonstrate three things: (1) injury in fact, by which we mean an invasion of a legal protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) a causal connection between the injury and the challenged conduct, by which we mean that the injury fairly can be traced to the challenged action of the defendant, and has not resulted from the independent action of some third party not before the court; and (3) a likelihood that the injury will be redressed by a favorable decision, by which we mean that the prospect of obtaining relief from the injury as a result of a favorable ruling is not too speculative. These elements are the irreducible minimum, required by the Constitution.

Id. (Quotation marks and citations omitted); *McConnell v. Federal Election Commission*, 124 S. Ct. 619, 708 (2003) (applying Article III standing rule).

In the present case, while the Howells allege that the Knudsens were deprived of procedural due process and that the Nevada State Engineer acted without authority in 1945, there is nothing to show that Howells were even born when the Applications were approved, much less that they suffered some "injury in fact" as a result. Rather, the facts demonstrate that the Howells purchased their real property many years later knowing full well that the water rights at issue in this case had been previously taken off the property. Thus, the Howells themselves did not suffer an injury, regardless of whether the Knudsens did, and any causal connection between the Knudsens and the Howells through the chain of title to the real property is too tenuous to be fairly traceable to the Nevada State Engineer's 1945 decision. Moreover, it would appear that the constitutional injury claimed by the Howells resulted, at least in large part, from the Knudsens' decision not to pursue a claim when they owned the property. Of course, the Knudsens are not before this Court.

The Howells' reasoning suggests that by purchasing real property, a purchaser automatically obtains Article III standing to file any constitutional claims relating to the property that might have been brought by anyone else who might have owned or had an interest in the property at some time in the past. The impact of such a result would certainly be enormous, given the manner in which property rights change hands, property interests are divided and re-divided, and administrative decisions affecting property interests are constantly being made and relied upon. Indeed, the potential for bizarre results is not difficult to envision. For example, had the Knudsens subdivided their property into hundreds of parcels, following the Howells' argument to its logical conclusion, each of the current owners would be able to assert the Knudsens' purported procedural due process claim at any time of their choosing in perpetuity, regardless of whether or to what extent others had developed their properties in

reliance on the applicable repose statutes. Irrespective of the Howells' reasoning, however, no authority could be found supporting such an argument and while the Howells argue that their property was impacted by an unconstitutional process that took place many years ago, the alleged constitutional injury was not personal to the Howells themselves. In short, the Howells have not personally suffered an injury, their interest in the outcome of a suit adjudicating the Knudsens' constitutional rights is not sufficiently concrete and the causal connection between the alleged injury and the conduct complained of is too tenuous to confer Article III standing upon them to assert the due process claims that might have been asserted by the Knudsens long ago.

Additionally, the Howells lack prudential standing, which is premised on the requirement that "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). This topic was recently discussed by this Court in *Elk Grove Unified School District and David W. Gordon, Superintendent v. Newdow, et al.*, 542 U.S. ___ (2004). In *Elk Grove Unified School District*, this Court reiterated the longstanding rule that in "every federal case, the party bringing the suit must establish standing to prosecute the action." *Id.* In that regard, this Court has created a "series of rules under which [it] has avoided passing upon a large part of all the constitutional questions pressed upon [it] for decision." *Id.* (quoting *Ashwander v. TVA*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring)). Included among these rules is the "general prohibition on a litigant's raising another person's legal rights." *Elk Grove Unified School District*, 542 U.S. at ___ (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). As this Court has noted,

> "There are good and sufficient reasons for the prudential limitation on standing when rights of third parties are implicated – the avoidance of the adjudication of rights which those not before

> the Court may not wish to assert, and the assurance that the most effective advocate of the rights at issue is present to champion them."

Elk Grove Unified School District, 542 U.S. at ___ (quoting *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 80 (1978)).

This subject was analyzed in the following discussion in *Singleton*, *supra*:

> Federal courts must hesitate before resolving a controversy, even one within their constitutional power to resolve, on the basis of the rights of third persons not parties to the litigation. The reasons are two. First, the courts should not adjudicate such rights unnecessarily, and it may be that in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not. Second, third parties themselves usually will be the best proponents of their own rights. The courts depend on effective advocacy, and therefore should prefer to construe legal rights only when the most effective advocates of those rights are before them. The holders of the rights may have a like preference, to the extent they will be bound by the courts' decisions under the doctrine of stare decisis. These two considerations underlie the Court's general rule: "Ordinarily, one may not claim standing in this Court to vindicate the constitutional rights of some third party."

Id. (Citations omitted). This Court went on to recognize two narrow exceptions to this rule in cases where the "relationship between the litigant and the third party may be such the former is fully, or very nearly, as effective a proponent of the right as the latter," or where the third party is unable to assert his own right. *Id.* at 114-5. However, neither of these exceptions apply here.

The Knudsens knew about the facts giving rise to the Howells' due process claims at least by 1962 and there is nothing in the record to suggest that there was some

obstacle to prevent them from bringing such a claim during that time frame had they chosen to do so. Certainly, the Knudsens, who are believed to now be deceased, were the ones who held the rights claimed by the Howells. These rights were personal to the Knudsens and no authority could be found for the proposition that such constitutional rights pass through the chain of title to property. The Knudsens, at least by implication, expressed their preference for not pursuing a procedural due process claim by not taking action and the Howells would not be furthering the Knudsens' interests were they allowed to pursue their procedural due process claims. Thus, the Howells are not an effective proponent of the Knudsens' rights and the fact that the Knudsens apparently chose not to pursue any rights they might have had, even though there is no evidence to show that they were unable to do so, provides a substantial reason for not allowing the Howells to pursue such a claim for their own exclusive benefit on the grounds of lack of prudential standing.[10]

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[10] While the Howells appear to have limited the issues in their Petition for Writ of Certiorari to the events of 1944 and 1945 respecting the Knudsens, as is discussed above, during the proceedings below the Howells challenged the Nevada State Engineer's July 19, 1999 letter rejecting the Hawks' report of conveyance. In this regard, it should be noted that the Hawks, not the Howells, submitted the report of conveyance to the Nevada State Engineer on August 19, 1997. (See Footnote 2, above). While the Howells have indicated in their pleadings that some type of agreement was worked out between the Hawks and the Howells concerning the water rights described in the report of conveyance, no evidence has been submitted to support this assumption. Therefore, since the Hawks are not parties to this action, it is believed that the Howells have failed to establish prudential standing to raise any claims in relation to the Hawks' report of conveyance.

CONCLUSION

For all of the foregoing reasons, the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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Governor

ROLAND D. WESTERGARD,
Director

PETER G. MORROS
State Engineer

STATE OF NEVADA
[LOGO]

DEPARTMENT OF CONSERVATION
AND NATURAL RESOURCES
DIVISION OF WATER RESOURCES
Capitol Complex
201 S. Fall Street
Carson City, Nevada 89710

September 25, 1986

RE: 11125, 11127, 21925, 21950

Royce Wood
Metropolis Route
Wells, Nevada 89835

Dear Mr. Wood:

Permit 11125, Certificate 2846, changed the point of diversion, manner and place of use of water heretofore appropriated under Proof No. 00608, Edwards Decree, pages 80-81 and 104. This included portions of "Sections 1 and 2, T.38N., R.61E.", M.D.B.&M.

Permit 11127, Certificate 2848, changed the point of diversion, manner and place of use of Proof No. 00608B, Edwards Decree, Page 81. This included the "NE¼ SW¼; SE¼ SW¼ all in Section 2, T.38N., R.61E.", M.D.B.&M.

The Proofs of Beneficial Use filed under the preceeding permits did not include any land in Sections 1 and/or

2, T.38N., R.61E., M.D.B.&M. Upon issuance of Certificates 2846 and 2848 the water rights under the Humboldt River Decree were removed from the aforementioned land.

Therefore, the only water rights existing on the sections in question are Permit 21925, Certificate 7853 and Permit 21950, Certificate 7854 (copies enclosed in the letter dated July 2, 1986).

Enclosed is a copy of a field investigation under Permit 21950, Certificate 7854. Hopefully, this will shed some light on the question of why more pasture exists than is covered by water rights.

RICHARD H. BRYAN,
Governor

ROLAND D. WESTERGARD,
Director

PETER G. MORROS
State Engineer

STATE OF NEVADA
[LOGO]

DEPARTMENT OF CONSERVATION
AND NATURAL RESOURCES
DIVISION OF WATER RESOURCES
Capitol Complex
201 S. Fall Street
Carson City, Nevada 89710

October 2, 1986

Royce Wood
Metropolis Route
Wells, Nevada 89835

Dear Mr. Wood:

Enclosed are copies of Permit 11125, Certificate 2846; Permit 11127, Certificate 2848; and Map No. 4 filed by the Pacific Reclamation Company to accompany Proof of Appropriation No. 00608.

Permit 11125, Certificate 2846, changed the point of diversion and manner and place of use of Proof 00608. The certificate changed 1.433 c.f.s. of the diversion rate of 1876 priority Bishop Creek water rights. The land to which the water was transferred does not include Sections 1 and 2, T.38N., R.61E., M.D.B.&M.

Permit 11127, Certificate 2848, changed the point of diversion and manner and place of use of Proof 006088. The certificate changed 0.381 c.f.s. of the diversion rate of

1876 priority Burnt Creek water rights. The land to which the water was transferred does not include Sections 1 and 2, T.38N., R.61E., M.D.B.&M.

The 1.433 c.f.s., 1876 priority, diversion rate from Bishop Creek and the 0.381 c.f.s., 1876 priority, diversion rate from Burnt Creek total 1.814 c.f.s. This is the entire diversion rate allocated from Bishop and Burnt Creeks as listed on page 81 of the Edwards Decree.

Therefore, it can be concluded that a water right no longer exists in Sections 1 and 2, T.38N., R.61E., M.D.B.

JOHN E. MARVEL
ATTORNEY AT LAW

285 10th Street
Elko, NV 89801

P.O. Box 2645
Elko, NV 89803

Paralegal
RAYMOND E. CONNELLY

Telephone (702) 738-9881
Fax Number (702) 738-0187

August 19, 1997

Barbara Kightlinger, Management Assistant II
Division of Water Resources
850 Elm Street
Elko, Nevada 89801

Re: *William Robert Hawks – Division of Water Resources*
Proof Nos.: 00608

Dear Barbara:

In connection with the above-mentioned proof, enclosed herewith please find the individual reports of conveyance and abstracts of title necessary to bring the ownership of that portion of proof 00608 current into the name of William Robert Hawks, et al.

The filing fees in the amount of $570.00 are enclosed, which represent payment on the following:

Portion of Proof 00608	$135.00
Portion of Proof 00608	$125.00
Portion of Proof 00608	$165.00
Portion of Proof 00608	$145.00
Total	$570.00

The subject decreed water rights are appurtenant to the land described as follows:

TOWNSHIP 38 NORTH, RANGE 61 EAST, M.D.B.&M:

Section 1: W½SW¼; SW¼NW¼
Section 2: E½SW¼; SE¼; SE¼NE¼

These water rights are specifically listed on page 81 of the Humboldt River Adjudication (Edwards Decree) under the source of Bishop and Burnt Creeks, Ditch Nos. 5 and 6, with a 1876 priority date for 147.44 acres of Harvest.

It is our understanding from previous discussions with your office that the subject water rights, in their entirety, are currently shown in the name of Stephen N. Bond. However, as you will note from the enclosed abstracts of title and accompanying deeds, Mr. Bond was only in title to a small portion of the above-described property. Therefore, the submitted abstracts of title all begin with ownership of Metropolis Land Company ("MLC"), the original claimant in the Bartlett Decree, except for a parcel in which the title chain begins with a land patent from the USA to Alonzo Knudsen, which patent was not issued until June 18, 1929 (consequently, MLC was never in title to this portion of said property).

Furthermore, it appears that the water rights adjudicated from Bishop and Burnt Creeks were erroneously transferred to Pacific Reclamation Water Company ("PRWC") under permits 11125 and 11127. Contrary to correspondence we obtained from the State Engineer's office (letter from Mr. Hugh Ricci dated

October 2, 1986) regarding the transfer of the water rights under said permits, the subject water rights appear to still remain appurtenant to lands in Sections 1 and 2. Mr. Ricci's correspondence refers to a Quitclaim Deed dated June 5, 1994, between Cooperative Security Corporation ("CSC"), as Grantor, and PRWC, as Grantee, to support said transfer. However, CSC never appears in the chain of title and, accordingly, PRWC had no interest in the water rights to transfer.

In light of the foregoing, unless there is some other documentation which we have not yet discovered or been provided by the State Engineer's Office, it appears that the subject decreed water rights should be brought current into the name of William Robert Hawks, et al., as submitted herewith.

In the event you have any questions whatsoever regarding this matter or require additional information, please immediately contact this office.

Yours truly,

/s/ John E. Marvel
JOHN E. MARVEL

JEM/rc
enclosures
cc: William Robert Hawks w/o enclos.
Fred Howell w/o enclos.

JOHN E. MARVEL
ATTORNEY AT LAW

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Elko, NV 89801

P.O. Box 2645
Elko, NV 89803

Paralegal
RAYMOND E. CONNELLY

Telephone (702) 738-9881
Fax Number (702) 738-0187

March 19, 1998

Barbara Kightlinger, Management Assistant II
Division of Water Resources
850 Elm Street
Elko, Nevada 89801

Re: *Proof Nos.: 00608*

Dear Barbara:

In reference to our recent telephone conversation regarding the above-mentioned proof, we have reviewed the deeds and legal descriptions previously submitted to your office and as you indicated, we made an error in preparation of the Report of Conveyance and Abstract of Title by stating the W½SW¼NE¼ of Section 1, T38N, R61E. The correct legal description should have been the W½SW¼NW¼ of Section 1, T38N, R61E. Therefore, enclosed herewith please find a corrected Report of Conveyance and Abstract of Title which should replace the one previously submitted.

Should you have any further questions whatsoever or require additional information regarding this matter,

please do not hesitate to give us a call. Thank you in advance for your assistance and cooperation.

Sincerely,

/s/ Ray Connelly
Ray Connelly
Legal Assistant to
JOHN E. MARVEL

REC/rc
enclosure

JOHN E. MARVEL
ATTORNEY AT LAW

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December 28, 1998

R. Michael Turnipseed, P.E.
State Engineer
Division of Water Resources
123 W. Nye Lane, Suite 246
Carson City, NV 89706-0818

Re: *William Robert Hawks, et al – Proof 00608*

Dear Mr. Turnipseed:

I am writing you this letter to request your personal assistance in reviewing the status of the transfer of a portion of the above mentioned proof.

On August 19, 1997, my office submitted certain Reports of Conveyance and Abstracts of Title ("R.C.A.T.") to the Elko Office of the Division of Water Resources, which were necessary to bring the ownership of a portion of proof 00608 into the name of my client, William Robert Hawks, et al. This transfer of ownership was in accordance with a Ranch Sale Contract between my clients and Michael T. Howell and Cheri A. Howell. Please find enclosed a copy of the letter of transmittal which accompanied the R.C.A.T. for your review and consideration.

Subsequent to our submission of information, on or about March 19, 1998, we received a telephone call from Barbara Kightlinger, Management Assistant II, in the

Elko Office, regarding an error in the legal description on one of the R.C.A.T. submitted. Mrs. Kightlinger was most helpful in identifying the error and after further review on our part of several Deeds, we re-submitted a corrected R.C.A.T. for a portion of the subject proof. Please find enclosed a copy of the letter of transmittal which accompanied the corrected R.C.A.T. for your information.

From the very beginning we anticipated that this transfer would take a considerable amount of time and research by your office given the fact that the subject water rights had apparently been erroneously transferred in the past. However, inasmuch as more than sixteen (16) months have passed since we originally submitted the documentation, we now respectfully request that the transfer be immediately expedited and the portion of proof 00608 be assigned to show William Robert Hawks, et. al as the current owners of record, unless there is some other documentation which we have not yet discovered or been provided by your office.

Thank you for your attention to this matter. We will be anxiously waiting to hear from you.

Very truly yours,

/s/ John E. Marvel
JOHN E. MARVEL

JEM/mt
enclosures

cc: Mr. Fred Howell w/o enclosures

KENNY C. GUINN
Governor

PETER G. MORROS
Director

R. MICHAEL TURNIPSEED, P.E.
State Engineer

STATE OF NEVADA

[SEAL]

DEPARTMENT OF CONSERVATION
AND NATURAL RESOURCES
DIVISION OF WATER RESOURCES
123 W. Nye Lane, Suite 246
Carson City, Nevada 89706-0818
(775) 687-4380 • (775) 687-6972

February 11, 1999

RE: Proof 00608

John E. Marvel, Esq.
Attorney at Law
P.O. Box 2645
Elko, Nevada 89403

Dear Mr. Marvel:

Thank you for your letter of December 28, 1998. As requested, this office has reviewed the subject decreed water rights, as well as the concerns detailed in your letter of August 19, 1997, to Ms. Barbara Kightlinger of our Elko Branch Office. These rights were appurtenant to portions of Sections 1 and 2 within Township 38 North and Range 61 East, M.D.B.&M. under the Humboldt River Adjudication.

In your letter to Ms. Kightlinger, you refer to another letter from Mr. Hugh Ricci dated October 2, 1986. A copy of this letter has been attached as "Exhibit A", for your reference. This letter states that the only water left

appurtenant to Sections 1 and 2, T.38N., R.61E., M.D.B.&M. are those listed under Permit 21925, Certificate 7852, and Permit 21950, Certificate 7854. Both of these water rights are currently assigned to William Robert Hawks, Joyce Lee Hawks, William Roy Hawks, and Greg Alan Hawks as the current owners of record in this office. The Summaries of Ownership for these rights have also been enclosed.

After reviewing all related files, it was determined that the transfer of water rights under Permit 11125, Certificate 2846, and Permit 11127, Certificate 2848, by Pacific Reclamation Water Company was valid. These permits transferred water rights from Bishop and Burnt Creeks, listed on page 81 of the Edwards Decree in the Humboldt River Adjudication, to a new place of use that did not include Sections 1 and 2, T.38N., R.61E., M.D.B.&M.

This issue had been decided upon in February 1944 by Alfred Merritt Smith, who was then State Engineer, and Edmund Muth, the Deputy State Engineer, at that time. I would like to direct your attention to three letters, of which I have attached copies, labeled "Exhibit B", "Exhibit C", and "Exhibit D". These documents establish that the approval of Change Applications 11125 and 11127 were in compliance with the contract between the State of Nevada and Pacific Reclamation Company dated December 28, 1910.

It was also decided by the State Engineer in 1946 that all the water rights of the Pacific Reclamation Company, a Carey Act Project, are now owned by the Pacific Reclamation Water Company, and the by-laws of the Corporation will control the use of the water, as the only right to the

water the individual has is his ownership of stock in the Company and that "the last provision of Sec. 4, Chap. 140 of the Statutes of 1913" applies to the Pacific Reclamation Water Company, and the water is not appurtenant to the land in the same sense as it is in the case of an individual." Also enclosed as "Exhibit E" is a copy of Nevada Revised Statute 533.040. In particular, Paragraph 2 is relevant in this situation.

The attachment labeled "Exhibit F" is a printout obtained from the office of the Secretary of State on February 2, 1999. The Secretary of State has affirmed that the Pacific Reclamation Water Company was incorporated on April 8, 1911, in accordance with the contract between the State of Nevada and Pacific Reclamation Company dated December 28, 1910. The Secretary of State also verified that the Pacific Reclamation Water Company remains in active status to date.

I hope that this has clarified the matter for you. If I can be of further assistance, please feel free to contact me at (775) 687-4381.

Sincerely,

/s/ Lisa B. Schettler
Lisa B. Schettler
Engineering Technician V

LBS/ld
Enclosures: Summaries
Exhibits
cc: Elko Branch Office

MARVEL & KUMP, LTD.
ATTORNEYS AT LAW

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May 25, 1999

R. Michael Turnipseed, P.E.
State Engineer
Division of Water Resources
Capitol Complex
123 W. Nye Lane, Suite 246
Carson City, Nevada 89706

Re: *Proof No.: 00608*

Dear Mr. Turnipseed:

On December 28, 1998 I submitted a letter to your office regarding the above-referenced proof. On February 11, 1999, we received a response to my letter from Lisa Schettler of your office. We have reviewed her response with our client and are still very concerned about the position of the State Engineer's office concerning this matter.

Contrary to Ms. Schettler's assertion that all water rights under Permit 11125, Certificate 2846 and Permit 11127, Certificate 2848, transferring waters from Bishop and Burnt Creeks to a new place of use by Pacific Reclamation Water Company, were in fact valid, we previously submitted Reports of Conveyance and Abstracts of Title to your office on August 19, 1997 to reflect the correct chain of title, together with filing fees in the amount of $570.00

which have been held by your office. Pacific Reclamation Water Company does not appear in this title chain. Accordingly, it appears that the transfer of water rights evidenced by the foregoing permits/certificates is incorrect. Due to the confusion in matters pertaining to the title to these water rights, and the fact that we have been unable to reach a mutually agreeable resolution as to the proper status of these water rights, I am requesting that we schedule a meeting to discuss the same. I would be willing to meet with you at your office Carson City or, if you will be coming to Elko in the near future, we could meet here at my office to further review the specific title issues relating to the subject proof.

I would appreciate hearing from you at your earliest convenience so that we may schedule a meeting to accommodate our schedules. I will look forward to hearing from you. Thank you for your cooperation and attention to this matter.

Very truly yours,

/s/ John E. Marvel
JOHN E. MARVEL

JEM/ve

Case No. CV-2804-5

Department I

IN THE SIXTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF HUMBOLDT

ooOoo

MICHAEL T. HOWELL and CHERI A. HOWELL,

Petitioners,

v.

HUGH RICCI, P.E., NEVADA STATE ENGINEER, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, STATE OF NEVADA and PACIFIC RECLAMATION COMPANY, a Nevada corporation,

Respondents. /

JUDICIAL REVIEW HEARING

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED that the above-entitled matter came on for hearing on April 22, 2002, of said day, before the HONORABLE RICHARD A. WAGNER, District Judge.

* * *

[48] THE COURT: I don't know about that, but we have our share.

MR. STANTON: – and probably is more acutely aware of that than anybody else in the world.

THE COURT: Well, they're important. And as you pointed out, what has happened, the history of water law in the State of Nevada, you start off with tradition and other things, and then as more and more people come, the laws become stricter as they go along. And frankly, I think that we're only seeing the beginning of it.

And what I hear and see as water law in the State of Nevada, as water becomes more and more critical, we keep saying that and they've said it for a hundred years, but as that becomes more and more critical, this is going to become an extremely important issue in the law. Even more so and more technical than it is today.

That's what's going to happen in response to the needs right now of what's happening in the state. So I understand generally what's happened in trying to interpret past law, to put it in context to the law today is a pretty difficult thing. But that's what we're doing here today is we're trying to put it in perspective, past decisions as to how that affects important water rights of individuals today. And so, I'm certainly not adverse to hearing that because it is – water is the lifeblood of anything that we

* * *